EXHIBIT 83

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VALVOLINE OIL CO.

Arbitration

May 14, 1987

In re VALVOLINE OIL COMPANY, DIVISION OF ASHLAND OIL, INC. and TEAMSTERS, LOCAL 986

Arbitrator(s)

Arbitrator: C. Chester Brisco

Headnotes

DRUGS AND ALCOHOL

-- Discharge -- Possession or use of cocaine -- Impairment▶ 118.311▶ 118.653▶ 118.67

Just cause existed to discharge union steward for on-duty possession of cocaine, where qualified, independent laboratory's tests on contents of vial that dropped out of his pocket during lunch with co-workers on business trip revealed cocaine, urine specimen taken on following morning contained cocaine, and integrity of chains of custody for vial and urine was established. Absence of evidence that steward ingested cocaine on company premises or that he was unable to perform duties on plant tour is immaterial; failure to discipline co-worker suspected of being under influence of marijuana on job is distinguishable on facts.

Attorneys

Appearances: For the company: Paul W. Cane, Jr. and Jennifer A. Glazer (Paul, Hastings, Janofsky & Walker), ttorneys. For the union: George A. Pappy (Pappy & Davis), attorney.

Opinion Text

Opinion By:

C. Chester Brisco

Decision of Arbitrator

POSSESSION OF COCAINE

Background

-- Valvoline Oil Company, a wholly owned division of Ashland Oil, Inc., blends bulk stock stored on the premises into a variety of motor oils and lubricants and distributes the finished product. M, prior to his termination, was a Blender and Shop Steward. On October 16, 1986, he was assigned to accompany Quality Assurance Coordinator Brian LaVelle, Plant Supervisor William Fugett, and Bargaining Unit Employee Jim Wilkinson on a trip from the Company's Santa Fe Springs plant to the Boise Cascade Company plant in Santa Ana. The purpose of the trip was to tour the Boise Cascade facility which supplies plastic containers to the Company. On the way, the four employees stopped for lunch at a restaurant in Norwalk.

As the lunch ended and Mr. Fugett was preparing to pay the bill, Mr. M excused himself to go to the bathroom. He had made a similar visit just before sitting down to lunch. As M, who was sitting next to the aisle, stood up, he removed his sun glasses from his pocket and laid them on the table. As he removed his sun glasses, Mr. LaVelle noticed something fall from M's pocket onto the carpeted floor of the aisle. M did not notice that he had dropped anything and he left the table.

Fugett, who was sitting directly across from M, had not noticed anything drop from M's pocket. LaVelle nudged Fugett and asked him to pick up whatever had fallen and hand it to him. Fugett did so. The object which Fugett recovered was a small brown vial with a black screw on top. The top incorporated a small black plastic spoon extending down the side of the vial. The spoon could be rotated from its position so that the top formed an extended handle of the spoon.

LaVelle examined the contents of the vial for a few seconds, replaced the cap and placed the small vial in his right pants pocket. Immediately thereafter M returned to the table, patting his pockets in a searching motion and mentioning something about having to carry so many keys. Nothing was said to M about the vial and the four continued to Santa Ana, conducted their plant tour and returned to Santa Fe Springs at about three o'clock in the afternoon.

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Upon their return, LaVelle and Fugett immediately reported to Plant Manager Mitchell Childs. LaVelle gave Childs the vial which he had kept concealed in his pocket and explained what had happened. Childs unscrewed the cap, examined its powdery white contents and concluded that it might be an illegal substance. He asked LaVelle and Fugett to locate M. They searched but could not locate him. When they returned, Childs went over the details of the story. Childs then consulted his superiors and it was decided to confront M when he came to work the next morning and to require a urine sample. Before leaving work, Childs placed the vial in a "can safe", a Valvoline oil can complete with all regular markings except it was hollow, with a secretly removable end and with added weights so that to the heft it is indistinguishable from a real can of oil. He placed the can safe on a shelf in an array of real Valvoline oil cans in his office for safekeeping.

The next morning, after M arrived at work, he was called into Childs office, and in the presence of Fugett, LaVelle, Assistant Manager Jerry Precise, and Alternate Shop Steward Ruben Flores, M was asked if the vial was his. M denied ever having seen it. M was requested to provide a urine sample and he agreed. M was provided with the Company's standard drug screen kit. Childs, LaVelle, Precise, and Flores observe M providing the urine sample. (The Union stipulated that the sample obtained was that of M.) M was suspended pending results of the tests.

Childs immediately sealed the urine sample and mailed it and the vial to the Rosemont, Illinois, laboratory with which the Company had contracted to perform its drug tests. The reports from the laboratory, dated October 23, 1986, was returned to the Company's offices in Ashland, Kentucky, and were received there by Physician Assistant Charles Elliott. The result of the test of the contents of the vial was "Positive: cocaine present." The result of the test of the urine sample was "that the cocaine metabolite is present in this specimen." Analysis of the vial's contents was performed by the Gas Chromatograph/Mass Spectrometer (GC/MS) method. Analysis of the urine sample was performed by an Enzyme Multiplied Immunoassay Technique (EMIT) and the positive results were confirmed by GC/MS.

Childs was informed by his supervisor in Kentucky of the results of the tests. Childs called M on October 24, 1986, and informed him that he was terminated and that a confirming letter would be sent. This arbitration resulted.

Issues

The parties submitted the following issues for determination:

1. Was the discharge of M for just cause?

2. If not, what if anything shall be the remedy?

Pertinent Portions of Company Policy

The company does not condone nor will it tolerate illegal drug use or abuse of alcohol or other legal [sic] controlled substances by its employees. . . .

To protect the health and welfare of employees, customers, shareholders and neighbors, the following policies and procedures have been adopted:

1. The possession, use, sale or purchase of unauthorized or illegal drugs or substances, or the abuse or misuse of legal drugs or alcohol on company premises, while on company business or during working hours, is prohibited. Any violation is grounds for disciplinary action, including termination.

2. Any employee under the influence of drugs or alcohol while on company premises, company business or during working hours is subject to disciplinary action, including termination.

* * *

5. The company may require medical screens as a condition of continued employment if reasonable suspicion exists that an employee's work performance or safety is impaired by the use of drugs or alcohol.

Positions of the Parties

Position of the Company: The Company summarizes the lengthy argument presented in its brief in these words:

> First, possession, use, or being under the influence of cocaine undeniably constitutes just cause for discharge. But it is not necessary for the Company to prove that M possessed, used, and/or was under the influence of cocaine. All that the Company need prove is that it reached a reasonable conclusion based on the best evidence available to it. Thus, in discharging M, the Company reasonably relied on multiple eyewitness accounts and highly reputable laboratory test results. All evidence overwhelmingly indicated that M had cocaine in his possession and in his system while on Company business. Since there were no mitigating or extenuating circumstances which would warrant lesser discipline, discharge is the appropriate sanction.
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> Second, assuming arguendo that the Company must prove that M in fact was possessing, using or under the influence of cocaine while on company business, the Company has done so. It provided overwhelming evidence that the vial belonged to M and that he had cocaine in his system. The Company ensured an unbroken chain of custody with respect to both the vial and M's urine sample. The Company also sought the most reliable tests possible that
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> M's vial and urine did in fact contain cocaine. Because being under the influence, using or possessing cocaine on company business constitutes just cause for discharge, the discharge must be sustained.

Position of the Union: The Grievant should be reinstated with back pay and benefits, argues the Union, for the following reasons:

1. Neither LaVelle nor Fugett saw the object which fell from Mr. M's pocket or saw it come to rest on the floor of the restaurant. It may have come from some other source. There is, therefore, no probative evidence that the vial belonged to M, who denied it was his.

2. The Company has also failed to authenticate the test result documents which were admitted into evidence by the Arbitrator over the objection of the Union. "The failure to properly authenticate the documents clearly caused a break in the chain of custody of the samples, for a considerable period of time." Even a technical break in the chain of custody has been held to invalidate a drug screen by arbitrators who should be sensitive to the accuracy of drug tests. Because of the failure of the Company to present any witness to authenticate the test result documents, the Grievant has been denied his right of cross examination.

3. "On the other side of the coin, M submitted a test result which showed no trace of drugs at a relevant time."

4. Finally, the Union points out that the Company has not consistently applied discipline in drug cases. Employee Chaney "was suspected by the Company of being under the influence, acted as if he were under the influence and admitted being under the influence of marijuana on the job. Yet, no disciplinary action was taken against him." The two cases are sufficiently similar so as to comprise discriminatory treatment of M. If the Company wishes to toughen up its drug policy, that is a new policy to be applied in future cases after appropriate warning and not in the instant case.

For the reasons set forth below, the Arbitrator has determined that the grievance of M must be denied.

The Company argues in the first instance that it must prove only that it "reached a reasonable conclusion based on the evidence available" that M possessed, used, or was under the influence of cocaine, a dischargeable offense under Company rules. The Arbitrator holds that this argument is unacceptable for the purposes for which it is offered in this case. An arbitration, perhaps more than other proceedings, is a search for the truth. The party which has the burden of proof, in this case the Company, must prove its case to the satisfaction of the arbitrator. The arbitrator must make a determination of the truth of conflicting claims and it is not sufficient that the Company reasonably believed a material fact to be true when, upon the evidence, the arbitrator finds that the fact relied upon is false.

In cases requiring medical evidence of physical condition and the prognosis of the grievant based upon diagnoses from competing physicians is in conflict, an employer may argue effectively that it acted reasonably with respect to the grievant based upon the medical evidence which it had in its possession and that the arbitrator should not attempt to weigh medical evidence. This rule is necessary because arbitrators do not have the expertise to evaluate the conclusions reached in medical reports.

This case, however, does not rest upon medical diagnosis. It rests, partially, upon evidence of chemical tests to establish whether or not M possessed, used, or was under the influence of cocaine as a fact. There is no conflict of views of competent physicians of the physical condition of M.

The Company has the burden of convincing the Arbitrator that M possessed cocaine as alleged, that he used cocaine, or that he was under the influence of cocaine in violation of Company rules. The Arbitrator is convinced that the object which fell from M's pocket in the restaurant was the brown vial identified as an exhibit in this arbitration. Although LaVelle did not recognize the object when it fell, he knew that it fell in the aisle adjacent to the table. Fugett recovered the brown vial in the area where LaVelle saw an object fall. Brown vials containing a white powdery substance are not normally found in restaurant aisles. There is no reasonable explanation for the vial to be in that place at that time other than it was the object which fell from M's pocket.

The Union argues that the lab reports were not authenticated, that they are hearsay, and that they should be rejected. The chain of custody has therefor not been established. Objections which seek to exclude evidence from arbitration are converted into questions of weight by arbitrators and the evidence is admitted for "whatever it is worth." The Union cites a well-known

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book as authority for its assertion that as a rule of evidence documents must be authenticated by testimony of the custodian of the document or other qualified witness. [1] This would require the appearance as a witness of a person or persons from the Rosemont, Illinois, laboratory which performed the chemical analysis. This is an impractical requirement for labor arbitration.

[1] Fairweather, Practice and Procedure in Labor Arbitration 293 (2nd ed. 1983).

The better view, which this Arbitrator follows, has been expressed as follows:

> When blood samples or other laboratory samples are secured, the union may challenge the test results by demanding that the employer prove the integrity of the chain of custody of the evidence. In general, arbitrators appear willing to accept in evidence the report of a qualified, independent testing laboratory without requiring the appearance of laboratory personnel as witnesses (although such personnel have sometimes appeared to explain the tests); the validity of the testing procedure may be presumed once the sample reaches the laboratory. . . . But the handling of samples before they reach the laboratory is often a crucial issue in arbitration. [2]

The chain of custody of the vial prior to its reaching the laboratory was convincingly established by the testimony of Fugett, Lavelle and Childs. The laboratory procedures were detailed in an affidavit signed by the seven persons in the lab who had anything to do with its processing. The lab is licensed and registered with the State of Illinois, the United States Government's Drug Enforcement Administration, the Illinois Dangerous Drugs Commission, the College of American Pathologists, and the United States Government's Department of Health and Human Services. The Arbitrator is convinced that it is a qualified, independent testing laboratory and that the test results in this case are accurate. The brown vial recovered by LaVelle contained cocaine.

These facts establish that M possessed cocaine while on Company business in violation of the rules which the Company had published to all employees by letter to all employees, dated August 4, 1986. M knew the rules.

The Grievant contests these facts by a denial that the vial was his and by offering his own urine sample test which he procured from a local laboratory on the morning following his suspension pending investigation.

The Arbitrator has already concluded that his denial of possession is not credible. That conclusion alone is sufficient to establish just cause for his termination. The Grievant's proffered drug screen is interesting because he argues that the Arbitrator should accept a test of an unobserved urine sample which was in his sole custody as superior to the observed urine sample obtained by the Company for which the chain of custody by disinterested parties was firmly established. The Union did not call as a witness any representative of the local laboratory which performed the test -- a lack which the Union argues renders the test results submitted by the Company fatally defective. The Arbitrator concludes that the weight of the evidence is clearly in favor of the Company's test results obtained from an observed urine sample.

The Union also argues that the Company's failure to discipline in the Chaney case comprises discriminatory treatment. The Chaney case is *distinguished by* a number of factual differences. M has a past record of discipline, including a demotion which was sustained in a prior arbitration, and Chaney, who is no longer an employee, had no disciplinary record. Chaney's behavior at work was described by M, who was Shop Steward,

as erratic, loud, and abnormal. Chaney balked at taking a drug test, admitted that he would fail the test because he had used marijuana the day before, and the Company merely sent him home. Chaney did not possess a controlled substance or drug paraphernalia on Company premises or while performing Company business. Finally, the Company's drug policy was reissued after the Chaney case and approximately two months before the instant case. Another employee was subsequently terminated for testing positive for ocaine. These differences are sufficient to distinguish the Chaney case from the instant case and to support che conclusion that the Chaney case does not comprise a lenient past practice which is controlling here.

The Company's case against the Grievant for use and for being under the influence of cocaine on the job is based upon the realization, which management had not considered before the incident in the restaurant, that M took frequent trips to the bathroom and that he had a record of mistakes and accidents. Childs felt that these could now be explained by M's use of cocaine. Also, M's behavior during the lunch at the restaurant was described as extremely talkative and he did not finish his lunch. The positive test for cocaine in his urine suggests that he must have ingested the substance within the last 24

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to 48 hours since the substance is metabolized out of the system after that time.

These facts do not establish that M's use of cocaine necessarily occurred on Company premises. The positive urine test establishes that cocaine was in his system during working hours, but apparently this condition did not prevent him from performing his duties on the plant tour on the day in question. The EMIT test is very sensitive and a positive result does not necessarily mean that the Grievant was under the influence of the drug to the extent that his work performance was impaired. However, it is the Arbitrator's conclusion that cocaine possession on Company business has been established and that fact is just cause for discharge.

AWARD

The discharge of M was for just cause.

[2] Denenberg and Denenberg, Alcohol and Drugs: Issues in the Workplace 76 (1983).

- End of Case -

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